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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum decision of the district court (R. 86–107) is reported at 222 F. Supp. 446. The opinion of the court of appeals (R. 114–124) is reported at 351 F. 2d 489.

JURISDICTION

The judgment of the court of appeals (R. 124) was entered on September 28, 1965. The court of appeals denied a petition for rehearing and rehearing *en banc* on March 21, 1966 (R. 125). The petition for a writ of certiorari was filed on June 16, 1966 and was granted on December 5, 1966 (R. 126; 385 U.S. 966). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character or amount of a property interest owned or transferred by the decedent, and the character or amount of such interest has been determined in a non-adversary State probate court proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Constitution, the Judicial Code, the Internal Revenue Code of 1954, § 2056, the pertinent Regulations, and § 12–401 of the General Statutes of Connecticut (Rev. 1964) are set forth in the Appendix, *infra,* pp. 31–36.

STATEMENT

Decedent's will and codicil provided, in part, that one third of his residuary estate was to be held in trust for his widow; she was to receive the income during her life and had a general testamentary power of appointment over the corpus. The remaining two thirds of decedent's residuary estate were left in separate trusts for nine grandchildren (R. 16–18, 24, 34–36).

The widow's trust clearly qualified for the marital deduction; the only question is the amount of the deduction. If, under Connecticut law, the federal estate tax was payable out of the entire residue of decedent's estate, the widow's trust would be approximately $1,700,000 (1/3 of the residue *after* payment of feder-

al estate taxes) and the marital deduction attributable to the widow's trust would be limited to that amount.[1] If, on the other hand, under Connecticut law, the federal estate tax was payable only out of the grandchildren's two thirds share of the residue, the widow's trust would be approximately $3,600,000 (1/3 of the residue *before* reduction for taxes) and the marital deduction attributable to the widow's trust would equal this larger amount[2] (R. 60, 67, 69, 87–88).

Under Connecticut's proration statute, a bequest which is exempt from estate tax is not to be reduced by any portion of such tax. Therefore, if the proration statute applies, the widow's trust, being deductible for purposes of federal estate taxes, would bear no part of those taxes and the entire federal estate tax liability would be payable out of the grandchildren's share of the residue. Conn. Gen. Stat. § 12–401 (App., *infra*, pp. 33–34). That statute applies unless decedent's will contains a "clear and unambiguous" direction to the contrary. Here, decedent's will provided, in part, that "The provisions of any statute requiring the apportionment or proration of such [death] taxes among the beneficiaries of this will * * * shall be without effect" (R. 12).

Decedent's executor took the position that this provision did not clearly and unambiguously negate application of the proration statute, that (in accordance with its terms) the entire federal estate tax attributable to the residuary estate should be paid out of

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[1] See 1954 Code § 2056(b) (4); Treas. Reg. § 20.2056 (b)–4 (App. *infra*, pp. 32, 35).

[2] The estate is concededly also entitled to an additional marital deduction of over $400,000 for other property which passed from decedent to his widow (R. 56–58, 69).

the grandchildren's trusts and that no federal estate tax should be paid out of the widow's trust. The executor therefore claimed a marital deduction attributable to the widow's trust of approximately $3,600,000 (R. 60, 67, 69). The Commissioner, on the other hand, took the position that the above-quoted language in decedent's will clearly rejected application of the proration statute, that the federal estate tax was therefore payable out of residue before divisions between the widow's and the grandchildren's trusts, and that the marital deduction attributable to the widow's trust was therefore approximately $1,700,000 (R. 40, 69).

After receipt of the 30-day letter stating the Commissioner's position, petitioner filed an application in the Connecticut probate court seeking a determination that it was proper to allocate the entire tax liability to the grandchildren's trusts (R. 26–38, 88). Notice of hearing on this application was given to the widow, to the District Director of Internal Revenue (who did not appear), to adult beneficiaries of the grandchildren's trusts, and to a guardian *ad litem* representing the minor grandchildren (R. 34–35, 80–81, 82, 88). The guardian *ad litem,* an attorney, filed a memorandum stating that if the tax were to be allocated under the proration statute, the trusts created for his wards would bear "substantially the entire tax" (R. 79). Nevertheless, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 80). So far as the record shows, no one opposed the executor's application. After a hearing at

which only the guardian *ad litem* and the executor's attorneys were present, the probate court filed a memorandum of decision which—without mentioning the language in the decedent's will that the "provisions of any statute requiring * * * proration of such taxes * * * shall be without effect"—followed the only position urged by the parties and held that the proration statute applied, on the ground that the decedent's will did not unambiguously direct otherwise (R. 81–82).

Petitioner paid a deficiency of $1,333,194, plus interest, brought suit for a refund, and moved for summary judgment (R. 6–11, 47–48). The United States opposed summary judgment on the ground that there was a genuine issue of material fact, *i.e.*, whether or not the Connecticut probate court proceedings had been adversary in nature.[3] The federal district court held that it was not bound by the Connecticut probate court's determination in any event but granted summary judgment for petitioner on the ground that decedent's will had not, in fact, negated application of the proration statute (R. 94–107).

The court of appeals reversed. It first examined the State law question and concluded that decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration" (R. 116). It then held that the State probate court decree was not conclusively binding in the instant case regard-

[3] R. 83, 105; Brief for the Defendant in Opposition to Plaintiff's Motion for Summary Judgment, pp. 39–54.

less of whether the State proceedings had been adversary "or non-adversary in nature" (R. 123). The court of appeals denied a petition for rehearing and rehearing *en banc* (R. 125).

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case and the companion *Bosch* case (No 673, this Term), present the question whether a taxpayer can, by obtaining an erroneous decree from a State trial court in a non-adversary proceeding, bind the Commissioner on an issue of State law on which a federal tax dispute turns. As we discussed at length in our *Bosch* brief (a copy of which has been served on petitioner), there are three principal approaches to this question. For reasons stated in that brief, we urge this Court to adopt the non-adversary approach.

Petitioner's argument that this Court is precluded from adopting the non-adversary approach by the full faith and credit clause is without merit. The federal court would not be required to give the State probate court judgment more effect than it would be given by Connecticut, and Connecticut would not treat the type of probate court judgment which is involved in this case as binding on the State tax authorities. In any event, the full faith and credit clause does not preclude the federal court from reexamining the underlying determinations on which the ultimate *in rem* decree was based. The probate court decree is conclusive on a non-party like the United States as to the ultimate determination contained in the judgment—*i.e.*, who owns the estate's assets. It cannot bind the United States, which was not a party, as to underlying de-

terminations such as how and when ownership of these assets was acquired by the respective beneficiaries—the issues on which federal tax liability turns.

The district court decided this case on summary judgment without receiving evidence on the question whether the Connecticut probate court proceeding was non-adversary. Therefore, although the record as it stands makes it clear that the probate proceeding was non-adversary—in the sense that all the parties urged the same result and there was no full and fair presentation of both sides of the issue—we suggest that if this Court adopts the non-adversary approach, this case should be remanded for findings on the non-adversary issue.

ARGUMENT

I

IN DECIDING AN ESTATE TAX CONTROVERSY, A FEDERAL COURT IS NOT BOUND BY AN ERRONEOUS STATE PROBATE COURT DETERMINATION RENDERED IN A NON-ADVERSARY PROCEEDING TO WHICH THE UNITED STATES WAS NOT A PARTY

A. THE NON-ADVERSARY APPROACH IS CORRECT

Both the district court and the court of appeals in this case held that, in light of the peculiar nature of the Connecticut probate court, the decree obtained by petitioner was not conclusive for federal tax purposes regardless of whether the State proceeding was adversary or non-adversary (R. 102–107, 114–124). This rationale is consistent with the so-called *Erie* approach (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64) under

which the federal court is never bound by a decision of a State trial court. (See our brief in the Bosch case, pp. 20–27.) Indeed, the court of appeals' analysis of the status of the probate court in the Connecticut judicial system is strikingly similar to the analysis in *King* v. *Order of Travelers,* 333 U.S. 153, where this Court declined to follow a State trial court decision obtained by one party to the federal action because the State court did not appear (p. 161) "to have such importance and competence within [the State's] * * * own judicial system that its decisions should be taken as authoritative expositions of that State's 'law'."[4]

Although, as indicated in our *Bosch* brief, there is support in logic and the decided cases for the *Erie* view, we urge the Court to adopt the non-adversary approach because it is supported by clear indications of Congressional intent, by the pertinent policy considerations, by long-standing Treasury Regulations, by this Court's decision in *Freuler* v. *Helvering,* 291 U.S. 35, and by the decisions of a majority of the courts of

[4] While Connecticut probate courts are regarded as courts of record, as petitioner correctly points out (Br. 27–28), their decisions are not published or digested in any form whatsoever. They are filed only in the books of the rendering probate court (of which there are 123 throughout the State), and even there the sole index appears to be by the name of the estate. Locke & Kohn, *Connecticut Probate Practice*, vol. 1, § 17, pp. 32–33, Thus, neither the same court nor coordinate courts are expected to give the unpublished decisions precedential weight in subsequent cases. And the trial of appeals from the probate court is completely *de novo*. *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 565–566, 192 A. 2d 44, 45–46; *Lockett* v. *Doyle*, 148 Conn. 639, 643–644, 173 A. 2d 507, 508. (Compare this statement of the status of Connecticut probate courts with the discussion in *King*, *supra*, pp. 160–161.)

appeals; and because it eliminates the potential unfairness inherent in both polar positions and achieves an appropriate accommodation of the respective roles of the federal and State courts in resolving tax controversies. Our reasons for this position are set forth at length in the *Bosch* brief (pp. 13–31); we merely summarize them here.

The non-adversary rule rests on the premise that Congress did not intend the federal fisc and the federal courts to be bound by non-adversary State trial court decisions in which there was no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal tax liability turns. We submit that this premise is preeminently sound.

The legislative history of the marital deduction provisions indicates that "proper regard should be given to interpretations of the will rendered by a court," not in every case, but only in those cases where the interpretation resulted from "a *bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334) (emphasis added).[5]

Moreover, until the enactment of a recent and lim-

[5] The Committee Report also provides that "any interest received by the surviving spouse under a settlement which does not reflect her rights under the local law does not pass to the surviving spouse from the decedent." *Ibid.* No distinction is drawn between in court and out of court settlements. See also the long standing Treasury Regulations discussed in text, *infra*, p. 10. Accordingly, if legatees agree to give the surviving spouse more than passed to her under the will, the settlement cannot affect decedent's federal estate tax liability.

ited amendment,[6] even a disclaimer of property by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2). Congress could not have intended the marital deduction to be augmented if a legatee disguised his disclaimer by participating in a non-adversary State trial court proceeding in which he voluntarily relinquished rather than asserted his rights under the decedent's will.

The Treasury Regulations have, since 1919, indicated that the government cannot be bound by an erroneous non-adversary State court decree involving no "active and genuine contest." And the marital deduction Regulations, since their promulgation in 1949, have indicated that the government is not bound by a consent decree, but strongly suggest that it is bound by a "decision of a local court upon the merits in an adversary proceeding following a genuine and active contest."[7]

Furthermore, this Court's decision in *Freuler* implies that a State trial court proceeding in which (p. 45) "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" would not be conclusive for federal tax purposes. Following this lead, a majority of the courts of appeals have declined to give conclusive effect to er-

[6] See footnote 14, p. 16 of our *Bosch* brief.

[7] Treasury Regulations (1954 Code), §§ 20.2053–1(b)(2), 20.2056(e)–2(d)(2) (Appendix, *infra*, pp. 34–35, 36), discussed in the *Bosch* brief, pp. 16–18.

roneous State court decrees that resulted from non-adversary proceedings.[8]

The non-adversary rule is also supported by compelling practical and policy considerations. It avoids the potential unfairness that is present under both polar positions. Under the rule that any state court decree is binding on the government (the so-called *Gallagher* rule), the government is bound by an erroneous State trial court decree resulting from a non-adversary proceeding—to which it was not a party and in which there was no fair presentation of the position it advocates—brought for the purpose of reducing estate taxes. Under the *Erie* rule, the litigant who vigorously but unsuccesfully asserts a position in an adversary State court proceeding is required to appeal to the highest State court if he is to foreclose

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[8] The cases upon which petitioner relies are primarily from the Third Circuit, the only circuit which has clearly rejected the government's view.

Petitioner also relies on decisions of the Fourth and Sixth Circuits, which have now adopted the non-adversary rule. See *Pierpont* v. *Commissioner*, 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908 (erroneous State court decree not followed "In view of the * * * nonadversary character of the [State] proceedings"); *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444 (C.A. 6) (federal court "not conclusively bound" by "nonadversary Probate court proceedings").

Finally, petitioner cites district court cases, most of which are not viable within their own circuits. See *Merchant's National Bank & Trust Co.* v. *United States*, 246 F. 2d 410, 417 (C.A. 7) (nonadversary probate court decree not binding); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232 (C.A. 7), certiorari denied, 371 U.S. 887; *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8).

the possibility that a federal court will impose estate taxes as if he had prevailed in the State proceeding. The non-adversary approach, however, achieves a salutary accommodation of the competing State and federal interests.

B. THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE THAT THE PROBATE COURT DECREE BE GIVEN CONCLUSIVE EFFECT IN THIS FEDERAL TAX CASE

In arguing that the probate court decree is conclusive in this proceeding, petitioner neither discusses the controlling factor of congressional intent nor considers the pragmatic and policy considerations that call for adoption of the non-adversary rule. Rather, petitioner relies on formal doctrine, urging that the probate court judgment is *in rem* and that the United States, although it was not a party, is bound under the full faith and credit clause (R. 30–33, 39).

Although, as we demonstrate below, the full faith and credit clause is not applicable in the instant case, it is clear that even if it did apply petitioner would not prevail. The full faith and credit clause and the implementing legislation (Constitution, Art. IV, Sec. 1; 28 U.S.C. 1738, App., *infra*, p. 31) never require a federal court to give a decree more effect than the State where the judgment was rendered would give it. The Supreme Court of Connecticut has held that the Connecticut tax authorities are not bound by a Connecticut probate court decree resulting from an agreement between the parties, reasoning that such a rule "avoids the possibility of compromise agreements designed to avoid a succession

tax." *Emanuelson* v. *Sullivan*, 147 Conn. 406, 410 161 A. 2d 788, 790 (1960). Since Connecticut does not treat such a decree as binding in a subsequent State tax suit, the full faith and credit clause does not require the federal court to follow it in a federal tax case.

Moreover, the full faith and credit clause does not apply here. Petitioner is seeking an *in personam* money judgment against the United States. Since an *in rem* judgment does no more than determine the respective ownership interests of all persons in the *res*, it is not binding with respect to other issues in an *in personam* proceeding against a person who was not a party to the *in rem* proceeding. The Restatement of *Judgments* provides that although an *in rem* judgment "is conclusive upon all persons as to interests in the thing," it "will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact."[9] The probate court decree is thus a conclusive determination only as to who owns the assets of the estate.

The probate court neither purported, nor did it have power, to decide the estate's *in personam* federal tax liabilities. And since the United States was not a party, it is not bound in later *in personam* tax liti-

[9] Restatement of Judgments (1942), § 73; see, *e.g.*, *id.*, § 75(2); *Freeman* v. *Anderson*, 119 U.S. 185; *Headen* v. *Pope & Talbot, Inc.*, 252 F. 2d 739, 744–745 (C.A. 3); *Harris* v. *Weed*, 89 Conn. 214, 221–224, 93 Atl. 232, 235.

gation by the underlying determinations upon which the ultimate *in rem* decree was based. As explained in our *Bosch* brief (fn. 21, p. 26), the probate decree settles once and for all who owns the decedent's assets (just as it would if the probate court had merely confirmed a voluntary transfer of rights between beneficiaries, *i.e.*, a gift). But it cannot settle, as against the United States, which was not a party, how and when ownership of these assets was acquired by the respective beneficiaries, *i.e.*, it cannot determine as against a non-party whether ownership of these assets passed to the beneficiaries from decedent at the moment of his death (as reqired by § 2056(e) and *Jackson* v. *United States,* 376 U.S. 503, if a marital deduction is to be allowed), or whether ownership passed to them from other beneficiaries who voluntarily relinquished their rights (in which case no deduction is allowed).

For example, assume that over a ten year period A and B, who are New York residents, have removed all the oil from a piece of desolate Oklahoma land, and that there is a dispute as to which of them inherited the land from C ten years before. A brings an *in rem* proceeding in Oklahoma to quiet title to the land, but because it is now almost valueless, B, who is not subject to the Oklahoma court's jurisdiction, does not appear. The Oklahoma court finds that A inherited the land from C ten years before and quiets A's title to the land. A then brings an *in personam* damage suit against B in New York for the value of the oil removed from the land over the past ten years by B. B defends on the ground that he, rather than A,

inherited the land from C, and B counterclaims for the value of the minerals removed by A. We submit (1) that A is—after the date of the *in rem* judgment—the owner of the land and, assuming that there was proper notification and publication, the full faith and credit clause bars another State from relitigating the question of such ownership, but (2) that A cannot use the *in rem* decree as the basis for obtaining an *in personam* money judgment against B, or as a defense to B's *in personam* counterclaim. Moreover, the State of Oklahoma, which, like B, was not a party to the *in rem* proceeding, is not prevented from seeking an *in personam* judgment for real estate taxes from B for the years before the judgment.[10]

This legal proposition—that underlying determinations on which an *in rem* judgment is based are not binding on a non-party in a later *in personam* suit—is especially applicable in a case like this one. Here, the *in rem* proceedings were non-adversary in nature,

[10] Here petitioner is attempting to use the *in rem* judgment affirmatively to obtain an *in personam* money judgment against the United States. If, instead of paying the tax and suing for a refund in the district court, petitioner had brought a suit in the Tax Court for a redetermination of the deficiency, petitioner would still be attempting to use the *in rem* judgment affirmatively in a suit which he was prosecuting against the United States. Internal Revenue Code of 1954, § 6213(a); Tax Court Rules of Practice, Rule 6. In any event, as we point out in the text, a person may not use an *in rem* judgment either affirmatively or defensively in a later *in personam* suit against a non-party to the earlier proceeding. In addition to the authorities cited *supra*, fn 9, p. 13, see *Smith* v. *Great Atlantic & Pacific Tea Co.*, 170 F. 2d 474 (C.A. 8); *McQuillen* v. *Dillon*, 98 F. 2d 726, 729 (C.A. 2), certiorari denied, 305 U.S. 655; *Sherman* v. *Jacobson*, 247 F. Supp. 261, 266–267 (S.D.N.Y.).

the State court could not have acquired jurisdiction over the United States, and the legitimate interests of the federal government in the proper administration of the federal tax laws would be defeated if the federal fisc were bound by post-mortem intra-family property dispositions. As this Court has noted, "those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy * * *" and especially where the issue was not "squarely litigated in a truly adversary proceeding." *Williams* v. *North Carolina,* 325 U.S. 226, 230 and fn. 6.[11]

Moreover, to accept the effect of *in rem* judgments as urged by petitioner would cause tax consequences to turn on a distinction between *in rem* and *in personam* judgments which is totally irrelevant to the administration of the federal tax laws. It is clear that a prior *in personam* judgment to which the United States was not a party is not entitled to full faith and credit as against it in a federal tax action. In *Freuler* v. *Helvering,* 291 U.S. 35, 43, this Court said that such a judgment "[o]bviously * * * had

[11] As to the application of full faith and credit against the United States or a State, see also *Riley* v. *New York Trust Co.*, 315 U.S. 343, 355–356; *Durfee* v. *Duke*, 375 U.S. 106, 115–116; *Land* v. *Dollar*, 330 U.S. 731; *Emanuelson* v. *Sullivan*, 147 Conn. 406, 161 A. 2d 788.

As to the significance of the legitimate interests of the forum, see also *Estin* v. *Estin*, 334 U.S. 541; *Emanuelson* v. *Sullivan, supra;* cf. *Watson* v. *Employers Liability Corp*, 348 U.S. 66, 73; *Pacific Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 501–502; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n of California*, 294 U.S. 532, 547.

not the effect of *res judicata,* and could not furnish the basis for the invocation of the full faith and credit clause." To allow an *in rem* judgment to have such effect would permit the tax consequences of a State court determination—*e.g.,* that a widow possessed a general testamentary power of appointment—to turn on whether that determination was rendered in an *in personam* action brought by the widow or trustee (as in the *Bosch* case) or in an *in rem* action for the probate of the donor's will (as in the instant case).[12]

There is no basis for imputing to Congress any intention to make federal estate tax consequences turn on such a distinction. Indeed, as pointed out above

[12] In view of the above quoted statement, petitioner's reliance on *Frueler* to support its full faith and credit argument (Br. 30–31) is misplaced. The remaining six decisions of this Court upon which it relies (Br. 30–31) are also inapposite. In three of those decisions, full faith and credit was not even mentioned. *Uterhart* v. *United States*, 240 U.S. 598; *Blair* v. *Commissioner*, 300 U.S. 5; *Helvering* v. *Stuart*, 317 U.S. 154. Two of the other cited decisions involved the effect that should be given to a former judgment rendered as between the same parties. *American Surety Co.* v. *Baldwin*, 287 U.S. 156; *Durfee* v. *Duke*, 375 U.S. 106.

The last case, *Tilt* v. *Kelsey*, 207 U.S. 43, held that in the absence of an attack on a New Jersey probate court's jurisdiction, a stranger to that suit (the State of New York), could not assert claims against the executor and beneficiaries after the probate court had made complete distribution of the assets and exonerated the executor and beneficiaries from liability. The Court rested this decision on the finality of the New Jersey probate court's action in making complete distribution of the assets and rendering a final accounting and upon New York's failure to step forward with its claim until long after the expiration of the period for the filing of claims. Here, however, so far as the record shows, the probate court has neither ordered final distribution of the assets, nor has it held a final accounting; on the contrary (as is typical in these cases), these steps have apparently been post-

and as discussed more fully in our brief in *Bosch*, all indications support the conclusion that Congress intended the tax effect of a State trial court decree to turn on whether it resulted from "a bona fide adversary proceeding." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334).

Thus, under the full faith and credit clause an *in rem* judgment can do no more than determine the ownership of decedent's property; it can not bind the United States, which was not a party, on underlying determinations such as how and when the beneficiaries received the property—on which the federal tax consequences depend. However, we believe that Congress intended the federal tax authorities to give a judgment rendered by a State trial court in "a bona fide adversary proceeding"—whether *in rem* or *in personam*—more effect than the full faith and credit clause requires, *i.e.*, where the State trial court proceeding involved a genuine controversy and the par-

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poned until the federal government's timely made tax claims are resolved. Moreover, in the later case of *Riley* v. *New York Trust Co.*, 315 U.S. 343, this Court recognized that a Georgia *in rem* probate judgment to which the State of New York was not a party could not be used to prevent New York from collecting taxes in a later proceeding brought in Delaware. The majority reasoned that the Delaware courts were not required to give full faith and credit to a Georgia decree awarding decedent's personalty located in Delaware when to do so would bar a stranger to the decree from later asserting his rights to such personalty (pp. 353–354). The concurring opinion by Justice Stone, joined by Justices Frankfurter and Jackson, agreed with the result reached by the majority but on the single ground that the New York administrator who was not a party to the Georgia proceeding could not be bound; otherwise, New York would be improperly foreclosed from litigating its right to collect taxes (pp. 355–356).

ties made a full and fair presentation of both sides of the issue, we believe that the federal courts must follow, for tax purposes, the underlying determinations necessary to the State court's judgment even though not required to do so by the full faith and credit clause.[13]

II

THE CASE SHOULD BE REMANDED FOR A FINDING ON WHETHER THE INSTANT STATE PROBATE COURT PROCEEDINGS WERE NON-ADVERSARY

The ultimate issue in this case is the amount of the marital deduction available to decedent's estate.

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[13] The full faith and credit clause gives Congress the power to regulate the "effect" to be given State judgments. Moreover, it is not the full faith and credit clause of the Constitution but a federal statute (28 U.S.C., § 1738, Appendix, *infra*, p. 31) which requires a federal court to recognize the judgments of a State court.

We have found six district court decisions dealing with the question whether the Social Security Administration is bound by a State trial court decree that determined a claimant's marital status. In *Miller* v. *Ribicoff*, 198 F. Supp. 819 (E.D. Mich.), *Nigro* v. *Hobby*, 120 F. Supp. 16 (D. Neb.), and *Marek* v. *Flemming*, 192 F. Supp. 528 (S.D. Tex.), the courts held that the Social Security Administration, which had not been a party to non-adversary State trial court proceedings was not bound thereby. In *Zeldman* v. *Celebrezze*, 252 F. Supp. 167 (E.D. N.Y.), *Starace* v. *Celebrezze*, 233 F. Supp. 452 (W.D. Pa.) and *Collins* v. *Celebrezze*, 250 F. Supp. 37 (S.D. N.Y.), the district courts concluded that similar State trial court decrees were binding on the Administration; the court in *Zeldman*, after "extensive research" into the legislative history of the Social Security Act, found no contrary congressional intent. 252 F. Supp. at 170. In addition to the obvious differences in policy considerations between the social security and tax areas, there is, as we have shown throughout, a strong congressional policy against binding federal tax authorities by non-adversary judgments.

If (as the government contends) decedent's will negated application of the State proration statute, then the federal estate tax would be paid out of the residue, both the widow's and the grandchildren's trusts would be reduced proportionately, and the marital deduction attributable to the widow's trust would be approximately $1,700,000 (R. 69).[14] If, on the other hand (as petitioner contends), decedent's will does not negate the proration statute, then the grandchildren's trusts would bear the entire burden of the tax, the widow's trust would bear none, and the marital deduction attributable to the widow's trust would be approximately $3,600,000 (R. 69).

The Connecticut proration statute applies unless the decedent's will clearly provides to the contrary. The Commissioner took the position that decedent's will negated application of the proration statute—and the court of appeals below agreed.

The record shows that the Connecticut probate court's contrary decision (R. 80–82) was made in a nonadversary proceding instituted in an effort to avoid estate taxes. Less than a month after the executor received written notice of the Commissioner's position, it petitioned the probate court to allocate estate taxes in accordance with the State proration statute (R. 26–27, 7–8). As the probate court noted, "the effect [of the executor's proposal] * * * is to relieve the residuary trust fund for the benefit of the widow of any part of federal estate taxes attributable to the residuary estate" (R. 81), and to impose the entire federal estate tax burden (of approximately $3,800,-

[14] See *supra*, pp. 2–3 and fn. 1, p. 3.

000 (R. 35)) on the grandchildren's trusts (R. 82). The decedent's two adult grandchildren received notice but did not appear at the hearing (R. 34–35, 76–77, 82, 88). The seven minor grandchildren were represented by a guardian *ad litem*, who filed a memorandum stating that if the tax were to be allocated as proposed by the executor, the trusts created for his wards would bear "substantially the entire tax." Nevertheless, he did not oppose that result; rather, after citing only one Connecticut case, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 78–80). On the same day that the probate court received the guardian's memorandum, it rendered its decision approving the uncontested proration as proposed by the executor (R. 78, 82).

In the district court petitioner moved for summary judgment; the government opposed on the ground, *inter alia*, that there was a genuine issue of material fact—the non-adversary nature of the probate court proceedings—and affirmatively alleged in its answer that the probate court decree "was the result of a proceeding which was collusive and/or nonadversary in nature."[15] The district court concluded that "upon the record before it," it was "not able to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature" (R. 105). However, it granted summary judgment on the ground that petitioner's interpretation of Connecticut law was correct. The court of appeals reversed

[15] R. 83; Brief for the Defendant in Opposition to Plaintiff's Motion for Summary Judgment, pp. 39–54.

on this point (which we discuss *infra* pp. 22–29), but agreed with the district court that "it was unnecessary to make a finding" as to the non-adversary nature of the probate court proceedings—because the court of appeals concluded the probate court decree would not bind the government in any event.[16] (R. 123.) Since the courts below did not specifically address themselves to the non-adversary question, this case should be remanded for appropriate findings.[17]

III

DECEDENT'S WILL CLEARLY NEGATED APPLICATION OF THE CONNECTICUT PRORATION STATUTE

The petition for a writ of certiorari in this case presented two questions—(1) whether the State probate court decree was conclusively binding on the

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[16] We pressed the non-adversary theory before both the district court and the court of appeals, urging the district court to deny summary judgment and the court of appeals to reverse the district court's grant of summary judgment because of the disputed factual issue as to whether the probate court proceeding was adversary. Consequently, there is no basis for the statement in petitioner's brief (Br. 34–35) that "the Government * * * should not be permitted at this late date to assert that a question of fact still exists."

[17] Petitioner claims that the government should have the burden of proving that the State court proceedings were non-adversary (Br. 34). However, since (1) petitioner is asserting the State court decree affirmatively as a bar to the federal court's examination of the State law issue, (2) the facts regarding the nature of the State court proceeding in which it participated are more readily available to it, and (3) the burden of proving all of the factual elements necessary to a tax refund is on the taxpayer, it would be more in accord with the normal burden of proof rules to place on petitioner the burden of proving that the State court proceeding was adversary. See *Salisbury v. United States*, 199 F. 2d 578, 580 (C.A. 5).

federal court in this tax case, and (2) even if it is not, whether the court of appeals was incorrect in holding that decedent's will clearly negated application of the Connecticut proration statute (Pet. 3). The government acquiesced in the request for certiorari only as to the former question and opposed certiorari on the State law question on the ground that the court of appeals' decision was correct and "even if it were not, interpretation of this particular language used in decedent's will presents solely an issue of State law and no issue of general importance warranting review by this Court" (Mem. 5, 6). Since in granting certiorari this Court did not limit the issues (R. 126), we shall briefly discuss the State law question in order (1) to show that the court of appeals was correct and (2) to illustrate the dangers of permitting non-adversary State trial court proceedings to control the resolution of federal tax controversies.

Decedent's will contains a "clear and unambiguous" direction against proration.[18] The two sentences

[18] The Connecticut proration statute, enacted in 1945, was designed to alter the then-existing rule that death taxes were payable out of the residuary estate absent a testamentary direction to the contrary. *Union and New Haven Trust Co.* v. *Sullivan*, 142 Conn. 685, 116 A. 2d 908 (1955). That rule caused residuary legatees, who often were members of testator's family, to pay the estate taxes attributable to specific, preresiduary bequests and thus to have their shares drastically reduced, contrary to the probable intention of testators. The proration statute is based on the principle that death taxes should be paid pro-rata by those who receive taxable bequests, whether shares of the residuary estate or specific bequests. Of course, a testator may desire that death taxes (like other debts) be paid out of the residue of his estate before it is divided into

in his will dealing with payment of taxes provide that (R. 12):

> One: I direct my executors * * * to pay out of my estate my just debts and funeral expenses and any death taxes * * *. The provisions of any statute requiring the apportionment or proration of such [death] taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate.

Decedent's will thus contains both an express instruction against proration of death taxes and a specific direction that "any statute requiring * * * proration of * * * such taxes * * * shall be without effect." It is difficult to conceive of any clearer and more unambiguous direction on the subject. None of the cases relied on by petitioner (Br. 16–26) involved an express direction against proration.[19] We have found no Con-

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the specified residuary shares; thus Connecticut permits a testator to direct that the proration statute not apply to his estate, provided that the testamentary direction against application of the proration statute is "clear and unambiguous." *Jerome* v. *Jerome*, 139 Conn. 285, 289; 93 A. 2d 139, 141 (1952); *New York Trust Co.* v. *Doubleday*, 144 Conn. 134, 128 A. 2d 192 (1956); Conn. Gen. Stat. (Rev. 1954) § 12-401 (App., *infra*, pp. 33–34).

[19] The cases cited by petitioner held that the following general language was too ambiguous to negate proration: *New York Trust Co.* v. *Doubleday*, *supra*, p. 141, 128 A. 2d pp. 195–196 ("I direct my executors to pay from my residuary estate 'all * * * death taxes' "); *Jerome* v. *Jerome*, *supra*, p. 290, 93 A. 2d, p. 142 (direction to executrices "to pay all of my just and lawful debts, funeral and testamentary expenses"); *McLaughlin* v. *Green*, 136 Conn. 138, 146, 69 A. 2d 289, 293 (1949) ("I * * * direct the payment of all [death] taxes from

necticut case in which an express direction against proration was held to be unclear or ambiguous.[20]

Petitioner argues that this express direction against proration is not sufficiently clear for two reasons. First, petitioner claims that there is an inconsistency between the first and second sentences quoted above. In the first sentence testator directed that death taxes be charged against the residue and not against nonresiduary legatees. Petitioner argues that the second sentence is contradictory because it provides that death taxes are not to be paid by the beneficiaries (which would include residuary legatees) (Br. 24–26). However, the second sentence does not (as petitioner contends) provide that the residuary legatees are "not to be held for the 'ultimate payment' of death taxes" (Br. 24). Rather, it directs that "any statute [*i.e.*, the proration statute] requiring * * * the ultimate payment of such [death] taxes" by the beneficiaries

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my residuary estate"); *Guaranty Trust Co.* v. *New York City Cancer Committee*, 145 Conn. 542, 548, 144 A. 2d 535, 538 (1948) ("I direct that [all death taxes] * * * be paid out of my residuary estate"); *Morgan Guaranty Trust Co.* v. *Huntington*, 149 Conn. 331, 334–335, 179 A. 2d 604, 607 (1962) ("I direct the payment by my executors from the capital of my residuary estate of any and all [death taxes] * * * levied on my estate"); *Matter of Shubert*, 10 N.Y. 2d 461, 474, 225 N.Y.S. 2d 13, 21, 180 N.E. 2d 410, 417 (1962) ("I direct that all [death taxes] * * * shall be paid out of my residuary estate"); *Matter of Duryea*, 277 N.Y. 310, 317, 14 N.E. 2d 369, 371 (1938) ("I direct that all [death taxes] * * * be paid out of my residuary estate and that all the foregoing gifts, legacies and devises shall be free from * * * such taxes").

[20] In fact, in *Crump* v. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (1957), the court upheld a direction against proration which was less specific than the one in this case.

shall be inapplicable—an entirely different proposition. Thus, the first sentence allocates taxes to the residue, and the second makes ineffective any statute which provides for proration of taxes among beneficiaries.

Second, petitioner points out that less than a month after decedent executed his will in 1958, he executed a codicil (R. 23–25), giving his wife a general testamentary power over the corpus of the widow's trust (R. 24). The codicil contains no language even suggesting any change in testator's prior direction against proration. Indeed, it states that "In all other respects I hereby republish and confirm my said will" (R. 24). Nevertheless, petitioner claims that it is uncertain whether testator intended his prior direction against proration to apply. Petitioner argues that only *after* execution of the codicil did the bequest of one-third of the residue to his widow qualify for the marital deduction and, thus, only then did the application of the proration statute to the residuary legatees become important.

However, it is clear that decedent's original will negated application of the proration statute, and no intent to alter this direction is expressed or implied by his subsequent codicil. Following established principles of will construction, the testator's express direction against proration would apply to codicillary gifts,[21] even without the clear statement in the codicil

[21] A will and a codicil are to be construed as part of the same instrument. *Meriden Trust & Safe Deposit Co.* v. *Spencer*, 127 Conn. 261, 16 A. 2d 349 (1940); *Colonial Trust*

that testator republishes and confirms his original will except as to those specific changes made by the codicil.[22] In the face of such clear testamentary language the Connecticut courts will not speculate upon the testator's intent.[23]

Even if Connecticut gave effect to imputed intentions, there is no basis for petitioner's claim that testator intended (Br. 26) "that his widow and his estate should have the full benefit of the marital deduction." Even as petitioner interprets the will, decedent's widow would receive only one-third of the residue, which is substantially less than the maximum allowable deduction of one-half of the adjusted gross estate. Moreover, decedent's will bequeathed one-

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Co. v. *Perry*, 118 Conn. 357, 172 Atl. 857 (1934); *Griffith* v. *Adams*, 106 Conn. 19, 33, 137 Atl. 20, 25 (1927).

Moreover, all provisions of a will should, so far as possible, be harmonized and given operative effect. *Cumming* v. *Pendelton*, 112 Conn. 569, 574, 153 Atl. 175, 177 (1931); *Reaney* v. *Wall*, 134 Conn. 663, 60 A. 2d 505 (1948); *Hoenig* v. *Lubetkin*, 137 Conn. 516, 79 A. 2d 278 (1951).

Finally, the fact that a codicil could have changed provisions of testator's will and did not is compelling evidence that testator intended no such change. *Griffith* v. *Adams*, 106 Conn. 19, 33, 137 Atl. 20, 25 (1927).

[22] There is no basis for petitioner's assertion that testator (Br. 21) "did not speak to that matter [proration as it applies to the residuary gifts] at all." He spoke clearly against proration as to "beneficiaries of this will." The plain and ordinary meaning of "beneficiaries" would include residuary legatees, as petitioner apparently admits (Br. 25).

[23] See *Swole* v. *Burnham*, 111 Conn. 120, 149 Atl. 229 (1930); *Bankers Trust Co.* v. *Pearson*, 140 Conn. 332, 345, 99 A. 2d 224, 230 (1953); *Auchincloss* v. *City Bank Farmers Trust Co.*, 136 Conn. 266, 269, 70 A. 2d 105, 107 (1949); *First National Bank & Trust Co.* v. *Baker*, 124 Conn. 577, 582, 1 A. 2d 283, 286 (1938).

third of the residue to his widow and two-thirds to his grandchildren; there is nothing to indicate that decedent intended, merely by qualifying the widow's trust for the marital deduction, to increase its corpus disproportionately to the rest of the residue. The fact that testator gave his grandchildren twice as much of the residue as he gave his widow hardly supports petitioner's argument that testator wished to favor his widow at the expense of his grandchildren by having the entire amount of federal estate tax (approximately $3,800,000 (R. 35)) fall on them and none on her.

As the court of appeals concluded (R. 116, 122):

> * * * The direction and intent set forth in paragraph "ONE" would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid proration.
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> * * * * *
>
> The courts would indeed be making a new will for the testator if paragraph "ONE" were to be interpreted as a direction that federal estate taxes not be paid "out of my estate" but that they be borne solely by the "two-thirds" trusts for the grandchildren. The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death.

So far as the record shows, none of the parties to the probate court proceeding made the contentions or cited the cases discussed and cited in this portion of our brief, even though the grandchildren stood to have (and did have) their share of the residue reduced by $3,800,000. They apparently were more concerned with saving more than $1,000,000 in federal estate taxes for the family. Thus, the Connecticut probate court action was brought not to resolve any controversy between the legatees but in an effort to determine a federal tax controversy in a non-adversary State court proceeding.

CONCLUSION

If, as we urge, this Court adopts the non-adversary approach, the judgment below should be vacated and the case remanded for further proceedings. If this Court adopts the *Erie* approach, the judgment below should be affirmed.

Respectfully submitted.

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